
(1996) 03 BOM CK 0021

In the Bombay High Court

Case No : Criminal Appeal No. 160 of 1994

Gajanansingh Ful Singh Rajput

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 02-03-1996

Acts Referred:

Evidence Act, 1872 — Section 113A
Penal Code, 1860 (IPC) — Section 306, 498A

Citation : (1996) CriLJ 2921 : (1996) 2 DMC 596

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : A.S. Mardikar, for the Appellant; S.B. Dawale, Additional Public Prosecutor, for the Respondent

Judgement

1. The accused Gajanansingh has challenged his conviction for an offence u/s 306 as also u/s 498-A of the Indian Penal Code by way of Criminal Appeal No. 160/94.

2. The prosecution story is extremely short :

Gajanansingh was the husband of Vijayabai. The said Vijayabai was reached to a hospital in Jalgaon Jamod in a burnt condition. The doctor on duty examined her and informed the police station about it. On receiving the information, the police arranged the taking of the dying declaration of the unfortunate lady. The said dying declaration was recorded by the Taluka Magistrate P.W. 8 Bhalchandra Warsale. On the basis of this dying declaration, a report was also scribed by the Police Station Officer Menghrajani and thumb-marked by the deceased and that report was treated as a First Information Report and on that basis the further investigation ensued. The accused was arrested. The lady died in the hospital at Khamgaon where she was referred by the Medical Officer of Jalgaon Jamod. After the necessary investigation including that of spot panchnama, inquest panchnama, seizure panchnamas of the clothes and other incriminating articles, etc., the charge-sheet came to be filed before the Judicial Magistrate, First Class,

Jalgaon Jamod by the police, who committed the matter to Sessions Court.

3. Before the Sessions Court, the accused was firstly charged on 17-6-1991. This was a charge framed by one Shri P. M. Bansod, Additional Sessions Judge wherein the accused was charged for abetting the suicide of his wife and consequent charge u/s 306 of the Indian Penal Code was levelled. The further charge was u/s 498A of the Indian Penal Code on the ground that the accused had treated her with physical and mental cruelty. One does not know what happened thereafter but there is a further charge on 15-9-1992. By this time Shri ` was probably transferred and was replaced by Shri B. G. Patil, Additional Sessions Judge. He framed another charge and in that it was alleged that Vijayabai the wife of the accused during her stay with the accused was ill-treated and tortured physically and mentally for about 7 years of her marital life and ultimately in the morning of 8-10-1989 she was beaten so mercilessly that it became unbearable for her and because of the accused's unbearable treatment she committed suicide by self-immolation in the house of the accused and by the act of merciless beating the accused had abetted the commission of suicide and thereby committed an offence u/s 306 of the Indian Penal Code. Conspicuously enough, this charge was framed on 15-9-1992 almost one year after the first charge. Both the original charges are on the record and the order-sheet is completely silent as to why the charge dated 15-9-1992 was felt necessary and under what circumstances, the said charge was framed. Strangely enough, again in the latter charge dated 15-9-1992 there is no allegation of an offence u/s 498A of the Indian Penal Code though in the wording of the charge such allegations are to be found. There is also no allegation of merciless beating that was alleged in the charge dated 15-9-1992. Be that as it may, the accused claimed that he was innocent and abjured the guilt.

4. In support of the prosecution, as many as about 9 witnesses came to be examined. Out of them, PW. 2 Vijaysingh, PW. 5 Mahadeosingh, PW. 4 Vishwanath, PW. 7 Manohar and PW. 6 Laxman are on the question of the ill-treatment and the relations between the husband and the wife. PW.3 Dr. Laxman Suradkar is the witness regarding the physical condition of the deceased after she was burnt. PW. 8 is the Taluka Magistrate who had recorded the dying declaration after getting a certificate from the Dr. Suradkar PW. 3 that Vijaya was in a fit condition to give a statement. PW.9 is the Investigating Officer and the other witnesses are panchas. On the basis of this evidence, the defence of the accused that he was falsely implicated was not accepted and he came to be convicted for both the offences as mentioned above. The conviction necessitates the present appeal. 5. The trial Court has accepted the evidence of PW. 4 Vishwanath, PW. 6 Laxman, and PW 7 Manohar who have spoken about the ill-treatment. Significantly enough in this case, it is not tried to be proved as to how many years of married life has been spent by the unfortunate lady with the accused. The evidence is wanting in that behalf. While according to some witnesses she was married in the year 1985 the dying declaration itself suggests that she was married for seven years. In the absence of a clinching evidence as

to the date of marriage, it cannot be said definitely that the prosecution has established that the lady has committed suicide within seven years of her marriage. The availability of a presumption u/s 113A of the Indian Evidence Act is, therefore, out of question.

6. In his evidence, PW. 6 Laxman has reiterated that the accused was ill-treating his wife and he knew this fact as he had heard the quarrels. According to him, the quarrels started only 2 or 3 years prior to the date of the incident. He claims his knowledge on account of his passing from the road on which the house of the accused was situated and he claims that he had witnessed such beatings. He claims that he was told by Vishwanath Dhudhane that the wife of the accused had received the burn injuries. He, therefore, immediately went to the spot to see that the door was chained from inside. He, therefore, contacted the Police Station telephonically and told them about the incident. There is a requisition on record in shape of Exh. 40 which is signed by this witness and proved by the investigating officer. In this requisition, however, this witness has stated that there was a rumour in the village that the lady was burnt by her husband and other relatives in the house by setting her on fire after pouring kerosene. Ordinarily this requisition would be of no consequence. However, since in this requisition this Police Patil has made an allegation of murder, it assumes importance. In his cross-examination, he had to admit that he had not stated before the police that the door was chained from inside. The cross-examination is then directed regarding the other witnesses, namely, Manohar and Vishwanath as probably these were the witnesses figuring in the trial. Vishwanath is admitted to be a person facing number of criminal trials. The witness also admits that Manohar and Samadhan were related to this witness. Significantly enough, Manohar is examined as PW. 7 and he has supported the prosecution as has been done by this witness. The witness admits that when his statement was recorded by the police, Vishwanath and Samadhan were also present. He also admitted that he did not intervene nor did he try to persuade the accused not to beat the wife. He also did not know the reason for the quarrel of the accused with his wife. The Court also put a question to this witness wherein he denied that he had a Khabari book. He was asked as to whether he entered the incident in the Khabari book. He denied to have done the same. He also admitted that he had never informed the police regarding the quarrel between the accused and his wife though he knew it to be his duty. The evidence of the witness is rather general in terms. Even on the matter of possibilities, it would not be possible that merely because the witness was passing from the house of the accused, he would be able to know that the accused was quarrelling with his wife. The whole attitude of the witness is extremely casual. The second witness on this point is Manohar PW. 7. Manohar PW. 7 as has been admitted by Vishwanath is his relative. His surname is also Wagh.

7. PW.7 Manohar also deposed that for two years the initial married life of the accused was peaceful and cordial. He, however, contends that thereafter the accused started ill-treating his wife and accused used to beat his wife and that

the wife used to go to her parental house and again used to come back for co-habitation. He claims that on the date of the incident, he was sitting in the verandah of his house along with Lalsing and he heard the shouts of his wife and that the accused Gajanan went towards S.T. stand along with his daughter and son and that his mother came out shouting that the wife was burnt. He admits that it has Gajanan who had taken his wife for hospitalisation. Even he had to admit that he did not inform about the quarrel to the house of the accused and wife of the accused was on visiting terms to his house. Even he had to admit that he was not knowing the reason as to why the wife of the accused used to go to her parents house every time. It was suggested to the witness that he was on inimical terms with one Motiram Wagh with whom the accused was working as a Munim. Of course, the witness has refuted the suggestion. He admits that he was a member of Gram Panchayat and so was one Samadhan Patil. Again even the evidence of this witness is of general nature. The witness had no reason to know about the so-called ill-treatment of the accused to his wife and any quarrels between them. Third witness on this point is PW. 4 Vishwanath.

8. Vishwanath PW. 4 also asserts that he knew the accused and that accused used to abuse his wife and he had seen it and there was marital discord between the accused and his wife. He also asserts that the wife of the accused had stayed at her parental house and then came back for co-habitation. He also gives the only reason of knowing about the quarrels as he used to pass through the road besides the house of the accused. He was also one of the witnesses who had rushed to the house of the accused and then to the house of Police Patil to inform the said fact. He admits that the statements of Samadhan, Laxman, Manohar were recorded on the same day in the Gram Panchayat Office. He had to admit that he had not stated to the police in statement that the accused used to abuse his wife. Thus, the very basis of the evidence of this witness falls down. He was candid enough to admit that he himself, Samadhan Patil, Laxman Wagh PW.6 and Manohar Wagh PW. 7 belonged to one group in the Gram Panchayat Party. He, however, denied that the accused was of the opposite group. Even it has come in the Court question that when he saw the quarrel of the accused with his wife, he did not try to know as to what was the reason for the said quarrel. In short, the evidence of these three witnesses is of extremely general nature. They were the ordinary residents of that village and thus had no special reason to know about the marital discord between the accused and his wife. There is a colour of politics in as much as all the three witnesses belonged to the same group in the Gram Panchayat. It is brought in the evidence that they were not on very cordial terms with the accused. The requisition Exh. 40 is a sufficient indication regarding the animosity that the Police Patil felt. This requisition was sent to the investigating officer who was specifically cross-examined on the basis of Exh. 40. That apart, even ordinarily had this evidence been available by itself, it could not have the effect of proving the marital discord between the accused and his wife. There is, however, a more serious circumstance on record and that is the evidence of PW. 2 Vijaysingh.

9. PW.2 Vijaysingh is also a resident of the same village Kajegaon. He was the witness who reached the house on seeing the fire in the house of the accused. He saw that the house was ablaze and everything was practically burnt. He saw that the wife was also burning. He claimed that he poured water on the person of the wife and he jumped into the said house from the adjoining wall, covered the body of the wife of the accused. He also suggests that there were 2 or 3 other persons who were trying to extinguish the fire. He claims that thereafter he searched for the accused and he met the accused at the distance of about 500 feet from the said house. He asked him to rush to the house and informed the fact to the police. He claims that it was the accused who telephonically contacted the police station and informed the said fact. He was the one who brought a matador on the spot and reached the wife to the hospital. He was cross-examined on this by the defence and in his cross-examination, he maintained that the relationship between the accused and his wife was quite cordial. He claims that accused's daughter used to visit his tailoring shop regularly and being the small village the persons knew each other quite well and, therefore, he could say that there was no quarrel between the accused and his wife. He also confirms that the relatives of the wife of the accused regularly used to visit the house of the accused. He also accepted the suggestion by the defence that the wife of the accused was suffering from mental illness. He further goes on to say she used to remain well sometimes. However, sometimes she used to make irrelevant talk. He had accepted in his evidence that he knew Laxman, Manohar, Samadhan and Vishwanath. He also knew that while Laxman was the Police Patil, Samadhan Wagh was his Sarpanch and that there were two groups in the village and while Laxman PW.6, Manohar PW. 7 and Samadhan were belonging to one party, one Kanhaiya and the accused belonged to the other party. Surprisingly enough, the evidence of this witness has gone unchallenged. The Public Prosecutor who had sought to prove the ill-treatment by the accused to his wife and had objective of establishing the marital discord between them did not choose to either re-examine the witness or declare him hostile and cross-examine him further. Therefore, there is now on record the evidence of the witness which is directly in conflict with the evidence of PW.4 Vishwanath, PW. 6 Laxman and PW. 7 Manohar who claimed that there was a marital discord between the accused and his wife and that the accused used to fight with his wife. This witness also establishes the existence of the group rivalry in the Gram Panchayat and emphatically puts it on the record that the accused belonged to a rival group of these prosecution witnesses. As if this was not sufficient, the prosecution examined PW. 5 Mahadeo who was the real brother of the deceased.

10. PW. 5 Mahadeo the real brother of the deceased has not supported the prosecution at all. On the other hand, he claimed that the marriage between his sister and the accused was performed in the year 1985 and the incident took place in the year 1989. As regards the relationship the witness reiterated that Vijaya never said anything against her husband and after one delivery her husband had come to fetch her back for co-habitation. He came to know about

the death of Vijaya due to burning at Daryapur. He in short refused to toe the line of the prosecution that there was a marital discord between the accused and his wife. He was cross-examined by the Additional Public Prosecutor. In his cross-examination he contended that the daughter of accused No. 1 was residing with him while the son was residing with the accused and that he was not on the visiting terms with the accused. He also refuted a suggestion that her sister used to complain that her husband used to beat her. He also rejected the suggestion that there was out of Court compromise between the witness and the accused. In the cross-examination at the instance of the defence, he claimed that at the time of the death her daughter was about 4 years old and that Vijaya had died after about 7 to 8 years of marriage. He also accepted that Vijaya was mentally sick and she was even treated for that purpose. The marital life between his sister Vijaya and the accused was also certified as cordial by this witness in the cross-examination. Now obviously the witness has been declared as a hostile witness and as such, his evidence is of no use to the prosecution. However, the admission of this witness that Vijaya was mentally sick goes a long way and corroborates the evidence of PW. 2 Vijaysingh. At any rate, the prosecution thus has presented a conflicting version regarding the marital relations of the accused with his wife. There is one set of witnesses who are inimical to the accused who claim that the relations were strained and that the accused used to ill-treat his wife while the other set of witnesses, namely, PW. 2 & PW. 5 do not support this theory. On the other hand, PW. 2 Vijaysingh goes on to prove that the relations were cordial and not only this but that Vijaya was mentally ill.

11. The matters do not stop here. There is a dying declaration on record. The dying declaration is proved at Exh. 33 by PW. 8 Bhalchandra who claims that he on receipt of the requisition went to the hospital, contacted the Medical Officer on duty, took his opinion that the patient was in a fit state of mind to give the statement and thereafter proceeded to record the dying declaration. In his evidence, he himself admits that he wanted to take either the signature or thumb impression of the patient Vijaya. However, as she started convulsing, the same could not be obtained below the said statement and he had made an endorsement to that effect in the dying declaration. In her dying declaration. Vijaya very specifically says that she was married about 7 years back and that accused was a licentious man, and therefore, there used to be quarrels between them. She further has stated that for 5 or 6 months the accused was beating her regularly every day. On the fateful day, which was Sunday also he started beating her as she was asking him to give up the licentiousness on which he beat her more. She, therefore, claimed to have poured kerosene on her person and set herself to fire. She was unable to tell as to who brought her in the hospital at Jalgaon. If the dying declaration is read as it is, it should be normally an end to the matter. However, the learned Counsel for the defence very strenuously attacked this dying declaration.

12. The learned Counsel for the appellant Shri A. S. Mardikar has taken me through the evidence of doctor as also the evidence of the Magistrate. The

learned Counsel firstly submitted that in his evidence the doctor has specifically admitted that when the patient was admitted she was in severe pains and, therefore, he immediately treated her. He admitted that he injected Decadron and Coramine and also put the patient on saline. He thereafter turned back and claimed that he had started the treatment only after the dying declaration was recorded. He also admitted that the documentary record as regards the treatment which was given to the patient was maintained in the hospital. The prosecution has obviously not produced the record. Shri Mardikar, therefore, strenuously urged that an adverse inference should be drawn against the prosecution. According to him the said record would have given us a clear picture as to what treatment was given and when. The doctor refuted the suggestion that he had not brought the record deliberately as it showed that the sedatives were introduced to the patient even before her dying declaration was recorded. Now in view of the contentions raised, the time factor would be very important. According to the medical certificate issued by the doctor at Exh. 19, the said medical certificate seems to have been issued at 9.30 hours. Obviously, the tenor of the certificate is that it is issued only after the dying declaration is recorded because there is a clear mention in the certificate that after the dying declaration the patient is referred to the District Hospital (Women), Khamgaon. The Medical Officer also confirms that an oral report was taken by the Police Station Officer, Jalgaon. It also gives a graphic picture of the treatment given to the patient. In that it is suggested that the patient was introduced Dextrose, Decadron, Coramine and Diazepam. This should not ordinarily put the Court on guard, but what is strange is that the dying declaration itself seems to have been recorded at 9.45 a.m. It is strange that the Medical Officer himself has put the time at 9.45 on the said dying declaration which is below the first endorsement regarding the condition of Vijaya. It is in the hands of this very doctor. Then at the end of the dying declaration the time mentioned is that the dying declaration was started at 9.45 and concluded at 10 O'clock. There is then an endorsement that the thumb impression of Vijaya could not be obtained as she was giving vigorous jerks. There is a last endorsement by the doctor at the end that Vijaya was conscious while recording her statement. Now from the very look of the lying declaration, it is clear that this dying declaration could not have been finished prior to 10 O'clock. When we see Exh. 35 the requisition, it seems to have been sent at 9.30 a.m. It was by this requisition that the services of the Taluka Magistrate were requisitioned. The time sequence, therefore, on these three documents, namely, Exhs. 19, 33 & 35 does not match at all. If the requisition was sent at 9.30, then the dying declaration could not have been finished at 9.30 and the medical certificate which was issued by the doctor could not have been issued at 9.30. From the tenor of the medical certificate it is trite that the said certificate has been issued after the dying declaration was recorded. The time sequence, therefore, of these three documents is really intriguing.

13. Shri Mardikar makes a further submission that besides this intriguing time sequence, there are inherent weaknesses in this dying declaration. He points out

that a statement is made in the dying declaration that the wife was married seven years prior to the incident. He has pointed out that in this case the prosecution has not in any manner brought any evidence to fix the date of marriage but the brother PW. 5 Mahadeosingh had clearly stated that the said marriage had taken place in the year 1985 which would mean that the wife at the time of the incident was married only four years. According to Shri Mardikar, this circumstance itself should put the Court on guard that there was a statement which was factually incorrect. If the brother himself had in his examination-in-chief stated that the marriage was in the year 1985 and the prosecution had not refuted that claim, then the mention that the lady was married seven years back in the dying declaration would render that sentence factually incorrect. The third circumstance that Shri Mardikar points out to assail the said dying declaration is that the dying declaration did not have any thumb impression of the maker thereof. He points out that the investigating officer has claimed that he had obtained the oral report Exh. 36 from the deceased and there was a thumb impression. He, therefore, points out that this was not a case where thumb impression could not have been obtained. If the investigating officer could obtain it, so could the Magistrate. However, he does not stop here and criticises the dying declaration further that apparently the deceased was giving very vigorous jerks. Now if, according to him, the deceased was giving extremely vigorous jerks just at the time when her thumb mark was to be obtained, he submits that it raises a very serious doubt regarding the capacity of the deceased to make a valid declaration in the nature of the dying declaration. He also suggests that this circumstance itself and along with the admissions given by the doctor go widely in favour of the defence to suggest that the deceased Vijaya was not in a fit condition and was in extreme agony at the time when her dying declaration was taken. That she was in extreme agony cannot be disputed which is clear from the evidence of the doctor. Further it has come in the evidence also of the Magistrate that Vijaya was in pains and was convulsing. Now if all the circumstances pointed out by the learned defence Counsel are considered cumulatively, it would put the Court on guard against the voluntary nature and the credibility of the said dying declaration. The time sequence which has been completely confused by the prosecution, the non-availability of the papers regarding the treatment, the evidence of the doctor that the patient was in extreme pains, the fact that the accused had suffered 90% of burns and last but not the least, the absence of the thumb mark on the dying declaration would put the said dying declaration in a serious jeopardy.

14. It is also further liable to be seen that there has been no effort on the part of the investigating agency to collect any evidence from the relatives of the deceased. It is strange that in a matter where the wife is burnt almost within seven years of her marriage, there should be no such evidence available. Strangely enough, the only evidence available was that of her brother-in-law to be cordial. Under such circumstances, it would be extremely hazardous to rely on this dying declaration. The dying declaration cannot be said to be free from

doubt. The trial Court has not considered the dying declaration in such details. After all the dying declaration was an important document which deserved a very serious consideration by the trial Court. I am afraid, the trial Court's attitude has been rather casual and complacent in respect of the dying declaration. In that view of the matter, the dying declaration will have to be rejected as at least not being free from doubt. If the dying declaration is removed from the armoury of the prosecution, then there remains no evidence either regarding the ill-treatment or regarding the fact that the wife died because of self-immolation.

15. It cannot be forgotten that there is a halting suggestion which has not been controverted, by PW. 2 Vijaysing that the wife was suffering from mental imbalance. If that point was not got cleared by the Public Prosecutor in the re-examination, the prosecution must suffer for its inaction. In that view of the matter. I feel no hesitation in rejecting the evidence of PW. 6 Laxman, PW. 7 Manohar and PW. 4 Vishwanath as regards the so-called ill-treatment. If the oral testimony of these witnesses is rejected and if the dying declaration Exh. 33 is viewed as a suspicious document, then there would be no evidence to rely for convicting the accused and the advantage must go to the accused by way of a benefit of doubt.

16. In the result, the Criminal Appeal is allowed .The judgment of the trial Court is set aside and conviction and sentence are also set aside. The appellant/accused is acquitted of all the offences. The fine if paid be refunded to the accused. The bail bonds be cancelled.

17. There was a Criminal Revision Application filed by the complainant which was registered as Criminal Revision Application No. 128/94. The said Criminal Revision was not admitted and was kept along with the present appeal for hearing. Shri Badang, the learned Counsel for the applicant who had filed this Revision, also reported no instructions. The Revision would obviously be of no consequence particularly because the appeal itself is being allowed. Consequently, the Revision Application is dismissed.

18. Appeal allowed.